Supreme Court, U.S.
FILED
JUN 15 1999
OFFICE OF THE CLERK

No. 99 346

IN THE
SUPREME COURT OF THE UNITED STATES

GLENN BOGGIA,

Petitioner,

v.

UNITED STATES OF AMERICA,
CHARLES M. CARBERRY, Chief Investigator,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JESSE S. DRUCKER
Counsel of Record
3380 Veterans Memorial Hwy.
Bohemia, New York 11716
(516) 737-3330

Attorney for Petitioner

3699

QUESTIONS PRESENTED

1. Did the union disciplinary panel that recommended Petitioner's expulsion from union membership have jurisdiction to decide the charges against Petitioner?

2. In this case of first impression, where the United States District Court for the Southern District of New York has exclusive original jurisdiction to review union disciplinary hearings overseen by a court-appointed review board, did the district court err in not stating a basis for affirming the decision to expel Petitioner from union membership?

3. Did the Court of Appeals for the Second Circuit err in affirmatively declining to apply a standard of review to its examination of the decision to expel Petitioner from union membership?

4. Did the Court of Appeals err in disregarding Petitioner's objections to tape recorded evidence upon which union disciplinary charges were based?

5. Did the Court of Appeals err in not determining that hearsay evidence supporting union disciplinary charges against Petitioner was not independently corroborated and, therefore, insufficient to support Petitioner's expulsion from union membership?

6. Should the substantial evidence standard of review applied by the court below in United States v. IBT (Giacumbo), 170 F.3d 136 (2d. Cir., 1999) be given retroactive effect?

LIST OF PARTIES

The Petitioner, Glenn Boggia, was the respondent in a union disciplinary proceeding commenced pursuant to United States v. International Brotherhood of Teamsters et al., 88 CV 4486 (DNE), Southern District of New York, and affirmed by the said court; the appellant to the United States Court of Appeals for the Second Circuit. Respondents, the United States of America and Charles M. Carberry, the Chief Investigator of the Independent Review Board, a body established as a result of the consent decree in settlement of the matter above, were the Plaintiffs and Appellees below. In this Petition, the parties will be referred to as the Petitioner and Respondent and, alternatively, by name. The reference "App." will refer to the rule-required appendix accompanying this Petition. All emphasis has been supplied by counsel unless otherwise indicated to the contrary.

TABLE OF CONTENTS

Page

Questions Presented..... *i*

List of Parties..... *iii*

Table of Contents..... *iii*

Table of Cited Authorities..... *vii*

Jurisdictional Statement..... 1

Statement of the Case..... 1

A. THE UNDERLYING PROCEEDING..... 1

1. The Underlying Civil RICO Action and Consent Decree Against the International Brotherhood of Teamsters..... 1

a. The Independent Review Board..... 2

b. The Procedural Aspects of the Referral and Hearing..... 3

2. The Action Against Local 282..... 5

B. THE CHARGES AND PROCEEDINGS AGAINST PETITIONER.....5

1. The Charges Against Petitioner.....6

2. The Basis for the Charges Against Petitioner 7

3. Petitioner's First Disciplinary Hearing.....8

4. Petitioner's Second Disciplinary Hearing.....8

a. The Evidence Against Petitioner..... 8

b. The Presentation of the Evidence Against Petitioner..... 10

c. Petitioner's Objections..... 10

d. The IBT Decision..... 11

5. The Review Board Determination and the District Court's Order..... 12

C. THE STANDARD OF REVIEW..... 12

ARGUMENT..... 16

A. THE COURTS ARE WITHOUT JURISDICTION TO REVIEW THIS MATTER..... 16

B. THIS MATTER WAS NOT DECIDED ON SUBSTANTIAL EVIDENCE..... 17

1. No Independent Investigation By Any Of The Charging Parties.....18

2. The Charging Parties' Exclusive Reliance on the FBI Reports..... 18

3. The Reviewing Court Also Erred in Regard to the Hearsay Evidence Presented..... 21

C. IN THE ALTERNATIVE, THE DECISION IN UNITED STATES V. IBT, (GIACUMBO), 170 F.3d 136 (2d. Cir., 1999), SHOULD BE GIVEN RETROACTIVE EFFECT..... 24

CONCLUSION..... 27

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Aquarius Marine Co. v. Pena
64 F.3d 82, 87 (2d Cir., 1995) 26

Chevron Oil Company v. Huson,
404 U.S. 97, 92 S.Ct. 349 (1971) 25

Chrysler Corporation v. U.S. Environmental
Protection Agency, 631 F.2d 865 (D.C. Cir., 1980) 14

Cipriano v. City of Houma
395 U.S. 701, 89 S.Ct. 1897 (1969) 25

International Brotherhood of Boilermakers v. Hardeman
401 U.S. 233, 91 S.Ct. 609 (1971) 12, 13

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct.1731 (1965). 25

Midtec Paper Corp. v. United States, 857 F.2d 1487
(D.C. Cir., 1988) 15

Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420 (1971) 18

United States v. Carmona, 873 F.2d 569 (2d Cir., 1989) 22

United States v. IBT (Boggia) 167 F.3d 113 (2d Cir., 1999) 13

United States v. IBT (Cimino),964 F.2d 1308
(2d Cir., 1992) 10

United States v. IBT (DiGirlamo), 19 F.3d 816,
(2d Cir., 1994) *cert. denied* 513 U.S. 873,
115 S.Ct. 199 (1994) 13, 15, 16

United States v. IBT (Friedman & Hughes),
905 F.2d 610 (2d Cir. 1990) 2, 13

United States v. IBT (Giacumbo), 170 F.3d 136
(2d. Cir., 1999) 24, 25, 26

U.S v IBT (Review Board Rules),
803 F. Supp. 761 (S.D.N.Y. 1992)
aff'd as modified, 998 F.2d 1101 (2d Cir.),
on remand, 829 F.Supp.
602 (S.D.N.Y. 1993) 2, 3, 4, 13, 14, 16

United States v. IBT (Review Board Rules)
998 F.2d 1101 (2d Cir. 1993) 2

United States v. IBT (Sansone), 981 F.2d 1362
(2d Cir., 1992) 15

United States v. IBT (Senese & Talerico), 941 F.2d 1292
(2d Cir.) *cert. denied* 502 U.S. 819
112 S.Ct. 76 (1991) 17, 21

United States v. IBT (Simpson)
120 F.3d 341 (2d Cir., 1997) 13, 14, 15

United States v. IBT (1991 Election Rules Order)
931 F.2d 177 (2d Cir., 1991) 2

United States v. Local 282 of Int'l Bhd. of Teamsters
No. CV-94-2919 (TCP) (E.D.N.Y.) 5

United States v. Long, 917 F.2d 691 (2d Cir., 1990) 23

United States v. Prescott, 920 F.2d 139 (2d Cir., 1990) 22

United States v. Sorrentino, 72 F.3d 294 (2d Cir., 1995) 24

Statutes

28 U.S.C. §1331 1

28 U.S.C.§1254(1) 1

Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1964 1

Administrative Procedure Act 13

5 U.S.C. §706 14

Other Authorities

IRB Review Board Rules, Section I(4) 4

IRB Review Board Rules, Section I(5) 4

IBT Constitution, Article XIX, Section 1(a) 4

IBT Constitution, Article II, Section 2(a) 6

IBT Constitution, Article XIX, Section 7(b)(1) 6

IBT Constitution, Article XIX, Section 7(b)(2) 6

IBT Constitution, Article XIX, Section 14(c)(1) 3

JURISDICTIONAL STATEMENT

Petitioner, respectfully requests this Court issue a Writ of Certiorari to the Court of Appeals for the Second Circuit to review the decision of said Court, in the within matter, duly filed by the Clerk of the Court on February 4, 1999.

Subject matter jurisdiction lies pursuant to 28 U.S.C. §1331. This Court's jurisdiction to review on a writ of certiorari lies pursuant to 28 U.S.C.§1254(1). On or about April 28, 1999, the Hon. Ruth Bader Ginsburg granted an extension of time to file this Petition to and including June 15, 1999.

STATEMENT OF THE CASE

A. THE UNDERLYING PROCEEDINGS

1. The Underlying Civil RICO Action and Consent Decree Against the International Brotherhood of Teamsters

The underlying action stems from a civil action filed by the United States on June 28, 1988 under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1964, against the International Brotherhood of Teamsters ("IBT"), its General Executive Board ("GEB"), the eighteen members of the GEB, the Commission of La Cosa Nostra, and various members and associates of La Cosa Nostra. United States v. IBT (1991 Election Rules Order), 931 F.2d 177, 180 (2d Cir., 1991).

The original complaint alleged that La Cosa Nostra had dominated the IBT through a pattern of racketeering activity. Id. The Government sought extensive equitable relief to eradicate La Cosa Nostra's corrupt influence over the union. Id.

On March 14, 1989, the United States District Court for the Southern District of New York (Edelstein, J.) approved the Consent Decree, which resolved the Government's claims against the IBT defendants. *See, e.g.*, United States v. IBT ('Friedman & Hughes"), 905 F.2d 610, 613 (2d Cir. 1990) (summarizing disciplinary provisions); United States v. IBT ("1991 Election Rules Order"), 931 F.2d 177, 180-81 (2d Cir., 1991); United States v. IBT (Review Board Rules"), 998 F.2d 1101, 1105-06 (2d Cir. 1993) (summarizing provisions relating to Review Board).

a. The Independent Review Board

Inter alia, the consent decree provided for the establishment of an Independent Review Board ("IRB" or "Review Board") to oversee disciplinary reform of the IBT. The IBT came into existence subsequent to the certification of the IBT's 1991 election. The operation of the Review Board is controlled by detailed rules (the "Review Board Rules") approved by the district court and the Second Circuit Court of Appeals. United States v. IBT (Review Board Rules), 803 F. Supp. 761 (S.D.N.Y. 1992), *aff'd as modified*, 998 F.2d 1101 (2d Cir.), *on remand*, 829 F.Supp. 602 (S.D.N.Y. 1993). Under the Consent Decree and the Review Board Rules, the three-member Review Board is vested with broad investigative and disciplinary powers

delegated by the officers of the IBT. The Consent Decree provides that "the [Review Board] shall exercise such investigative authority as the General President and General Secretary-Treasurer are presently authorized and empowered to exercise pursuant to the . . . IBT Constitution, as well as any and all applicable provisions of law." United States v. IBT, 829 F. Supp at 605. The Review Board may exercise this authority to investigate, among other things, allegations of corruption and organized crime influence within the IBT. Id.

The Review Board must refer all disciplinary matters to the IBT before conducting a hearing. Matters are referred in the form of a Review Board Investigative Report which sets out charges, findings, and recommendations. Id. In this manner, the IBT is thus afforded the first opportunity to take "whatever action is appropriate under the circumstances." The Review Board retains the authority to monitor those matters it refers to the IBT. The Review Board convenes its own hearing only if the IBT's resolution of the matter is determined to be "inadequate," or if the IBT refers the matter back to the Review Board. Id.

b. The Procedural Aspects of the Referral and Hearing

As described above, disciplinary matters are referred to the local unions pursuant to the Consent Decree. Authority for the referrals is also found in Article XIX, Section 14(c)(1) of the IBT Constitution. That authority clearly states that "[t]he Union entity to which the matter has been referred shall promptly take whatever action is

appropriate under the circumstances and shall within ninety (90) days of the referral make written findings setting forth the specific action taken and the reasons for the action." *See also* United States v. IBT (Review Board Rules), 829 F.Supp at 606. In addition, Article XIX, Section 1(a) of the IBT Constitution states: "A member or officer of a Local Union charged by any other member of the Local Union with any offense constituting a violation of this Constitution shall, unless otherwise provided in the Constitution, be tried by the Local Union Executive Board."

In the instant matter, as described below, pursuant to its authority under Section I(4) of the Review Board Rules, the Review Board instructed the local union Trustee that he had sixty (60) days within which to hold a hearing and to forward a final written report to the Review Board. Section I(5) of the Review Board Rules mandates that "[t]he entity shall resolve the referred matter within the time prescribed by the Review Board in the Investigative Report." United States v. IBT (Review Board Rules), 829 F.Supp. at 606.

Pursuant to the Consent Decree, the United States District Court for the Southern District of New York has exclusive original jurisdiction over appeals from the decisions of the Review Board. United States v. IBT (Review Board Rules), 829 F.Supp. at 608.

2. The Action Against Local 282

On June 21, 1994, the Government commenced a separate civil RICO action in the Eastern District of New York against Local 282, its General Executive Board, and various individuals. United States v. Local 282 of Int'l Bhd. of Teamsters, No. CV-94-2919 (TCP) (E.D.N.Y.). In January 1995, the United States and Local 282 resolved that separate action by entering into a consent judgment designed to eradicate any influence of organized crime or corruption over Local 282. The Local 282 Consent Judgment created a monitorship over Local 282 and established the positions of IBT Trustee, Corruption Officer, and Corruption Counsel. The Local 282 Consent Judgment authorized the Local 282 Corruption Officer to investigate allegations of corruption and to seek the expulsion of any member of Local 282 by referring the matter to the Review Board.

B. THE CHARGES AND PROCEEDINGS AGAINST PETITIONER

Prior to his expulsion in 1997, Petitioner was a member of IBT Local 282, which is located in Lake Success, New York. With approximately 3,000 members, Local 282 represents truck drivers and other workers responsible for transporting building materials to construction sites in the New York Metropolitan area. Petitioner joined Local 282 on July 3, 1974, as a driver. In 1976, Petitioner became a Working Teamster Foreman, also denoted as an "on-site steward." An on-site steward represents the union at a construction site and is responsible

for assuring the employers' compliance with the collective bargaining agreement.

1. The Charges Against Petitioner

In and around July 1995, the Local 282 Corruption Officer purportedly procured from the Federal Bureau of Investigation ("FBI") files concerning information about certain Local 282 officials and members, including Petitioner.

On March 16, 1996, the new Local 282 Corruption Officer referred Petitioner to the Review Board for disciplinary action after the Corruption Officer allegedly reviewed FBI files purporting to indicate that four years earlier, on April 7, 1992, Petitioner had accepted a bribe. On August 5, 1996, consistent with the Consent Decree, the Review Board prepared and forwarded a Review Board Investigative Report to Local 282, recommending that Local 282 initiate charges against Petitioner for allegedly bringing reproach upon the union and violating the IBT Constitution by participating in the alleged bribery scheme. On August 16, 1996, the IBT filed the Review Board's recommended charges against Petitioner and, as a result, Local 282 propounded the following union charges against Petitioner:

> While a member of Local 282, you brought reproach upon the IBT in violation of Article II, Section 2(a) and Article XIX, Section (7)(b)(1) and (2) of the IBT Constitution, to wit:

> On or about April 7, 1992, while a member of Local 282 and working for Browman Transportation, you accepted a $1,250.00 bribe from an individual known to you as Frank Falco to secure labor peace on a Queens, New York construction project.

Irrespective that the charge was filed on the recommendation of the Review Board, and a hearing should have been conducted by a local union panel, the local union Trustee transferred the case from Local 282 to the IBT for hearing.

2. The Basis for the Charges Against Petitioner

The entire case against Petitioner, the Review Board "Investigative Report," consists of sixteen (16) exhibits and a tape recording of a purported conversation between Petitioner and a paid informant. The record of the case contains no authentication of the materials comprising the "Investigative Report," no explanation of their origin, nor any justification of the release of law enforcement documents to the Corruption Officer.

Purportedly, the Local 282 Corruption Officer investigated the allegations against Petitioner prior to conveying those allegations to the Review Board's Chief Investigator. The hearing reveals that no such investigation was performed; rather, the Corruption Officer merely

collected the material made available from the FBI without attempting to independently corroborate the allegations or even attempting to interview witnesses critical to the allegations.

3. Petitioner's First Disciplinary Hearing

On October 16, 1996, then IBT General President Ron Carey ("Carey") appointed an IBT disciplinary panel to hear the charges against Petitioner. Following a hearing, the panel concluded that the charges against Petitioner had been proven and recommended to Carey that Petitioner be permanently expelled from the IBT. On February 12, 1997, Carey issued a decision adopting the hearing panel's recommended sanction. Petitioner requested that the Review Board review the IBT's disciplinary action.

On April 15, 1997, the Review Board directed the IBT to conduct a new hearing on the ground that the panel had not provided Petitioner with the exhibits to the Review Board Investigative Report at least ten days prior to the hearing. On June 6, 1997, Carey appointed a new hearing panel.

4. Petitioner's Second Disciplinary Hearing

a. The Evidence Against Petitioner

The new hearing panel appointed by Carey conducted its hearing on June 25, 1997. At the hearing, the IBT's evidence relating to the charges consisted principally of five exhibits: 1) an FBI report dated April 8, 1992 stating

that on April 7, 1992 an informant was equipped with a recorder to record a conversation with Petitioner and a man named Anthony Lewis; 2) an April 8, 1992 FBI memo stating that the informant was allegedly provided with "marked" bills on April 7, 1992, including $1,250.00 in an envelope labeled "Boggio;" 3) a surveillance log dated April 7, 1992 in which it is alleged that the informant met at a diner with Petitioner and one Anthony Lewis. Importantly, the log does not indicate that any money or an envelope exchanged hands between Petitioner and the informant, but states only that Petitioner and the informant met together at a diner and in a car; 4) an FBI memo describing the interview with the informant in which the informant claims Petitioner took an envelope during their meeting on April 7, 1992. Parenthetically, no report was presented concerning any search of the informant to eliminate the question that the informant may have sequestered the money rather than have given it to Petitioner,[1] nor was there an accounting for a fifteen (15) minute interval where the informant was out of surveillance after the meeting with Petitioner. Additionally, although the bills were purportedly "marked," the Review Board never presented an FBI report indicating that Petitioner ever possessed or negotiated the bills he purportedly accepted for the bribe, nor was evidence ever presented that the marked bills were ever accounted for; and 5) the purported transcript of the conversation between Petitioner

---

1 The Local 282 Corruption Officer, a former police lieutenant, testified at the union disciplinary proceeding that the proper procedure would have been to search the informant in order to assure that he had not sequestered the money.

and the informant. No attestation was included that the transcript was accurate or final. *See* United States v. IBT (Cimino), 964 F.2d 1308, 1312 (2d Cir., 1992) (Reliability of hearsay testimony as a result of attestation). Nor was the chain of custody of the tape assured, an important fact in light of Petitioner's contention that the tape had been physically altered. As to Petitioner, the transcript is exceedingly brief, with the informant doing most of the talking.

b. The Presentation of the Evidence Against Petitioner

Little effort was made to prove the charges against Petitioner. The individual presenting the charges relied on the Review Board report and the exhibits and simply played the tape of the purported April 7, 1992 conversation between Petitioner and the informant. The panel was provided with a transcript prepared by the FBI of that tape recording. The informant was not called to testify. No witnesses with knowledge were presented to support the charges, nor was any evidence from any FBI or law enforcement source introduced to verify, authenticate, or corroborate the selected compilation of law enforcement documents used against Petitioner.

c. Petitioner's Objections

At the hearing, Petitioner objected to the charges preferred against him, to his not being permitted to have counsel present, and to procedural deficiencies in the

manner the hearing was being conducted. Inter alia, Petitioner objected that

1) The hearing was illegally constituted in that the IBT General President and the General Executive Board were not authorized to conduct a hearing on the charges, pursuant to the IBT Constitution.

2) The hearing was not convened in a timely manner pursuant to the IBT Constitution or the Review Board Rules.

3) The tape recording of the conversation between Petitioner and the informant was corrupted in that, (a) there appeared to be a hum simultaneously under the confidential informant's speech which would indicate some sort of re-recording, (b) there appeared to be a splice or edited section within the informant's speech, (c) speech attributed to Petitioner seems to have been overdubbed, (d) the voice of an unidentified party appears on the tape.

d. The IBT Decision

The hearing panel issued its written findings and recommendations finding that "Petitioner accepted the bribe offered to him by the informant on April 7, 1992 for the purpose of securing labor peace at a construction project." The panel found that the "tape recording clearly demonstrates - that Petitioner accepted an envelope containing $1,250 from [the informant]," rejecting Petitioner's statements that he did not accept a bribe. The

panel recommended that Petitioner be permanently expelled from membership in the IBT and its affiliates, and barred for life from accepting or seeking IBT employment. IBT General President Carey adopted the panel's recommendation in its entirety.

5. The Review Board Determination and the District Court's Order

On October 24, 1997, Petitioner requested that the Review Board again review the IBT disciplinary action pursuant to the authority granted the Review Board under the consent decree to monitor all matters it referred to the IBT. On December 17, 1997, the Review Board notified Petitioner of its determination that the IBT disciplinary action was "not inadequate." (App., p. 1). Petitioner requested review by the United States District Court for the Southern District of New York on January 8, 1998.

On March 9, 1998, the Review Board applied to the district court requesting that the Court enter the Review Board determination as an order. Petitioner opposed the application and on April 15, 1998, the district court upheld the determination in a one (1) sentence order. (App., p. 1). The appeal to the United States Court of Appeals for the Second Circuit followed.

C. THE STANDARD OF REVIEW

Internal union proceedings have traditionally been reviewed by the courts under a "some evidence" standard. *See* International Brotherhood of Boilermakers v.

Hardeman, 401 U.S. 233, 246, 91 S.Ct. 609, 617 (1971)("A stricter standard . . . would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs, and would require courts to judge the credibility of witnesses on the basis of what would be at best a cold record.").

The United States Court of Appeals for the Second Circuit has consistently maintained that the determination of the Review Board is due great deference by the District Court reviewing a Review Board decision. United States v. IBT (Boggia) 167 F.3d 113, 119 (2d Cir., 1999); *See also,* United States v. IBT (DiGirlamo), 19 F.3d 816, 820 (2d Cir., 1994) *cert. denied* 513 U.S. 873, 115 S.Ct. 199 (1994); United States v. IBT (Friedman & Hughes), 905 F.2d 610, 616-617 (2d Cir., 1990). The Review Board Rules provide for review of decisions of the Review Board under "the same standard of review applicable to review of final federal agency action under the Administrative Procedure Act." United States v. IBT (Review Board Rules), 829 F.Supp. at 608. Accordingly, under this standard the district court must treat a determination of the Review Board with "great deference," United States v. IBT (Simpson), 120 F.3d 341, 346 (2d Cir., 1997), and can reject a determination by the IBT only if the district court finds the Review Board determination to be:

1. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

2. contrary to constitutional right, power, privilege, or immunity;

3. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

4. without observance of procedure required by law;

5. unsupported by substantial evidence . . . ;

6. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

See United States v. IBT (Simpson) 120 F.3d at 346. (quoting 5 U.S.C. §706).

The Review Board monitors disciplinary action taken by the IBT to determine whether the IBT acted "in a lawful, responsible, and timely manner" and whether the IBT's resolution of the matter was "inadequate under the circumstances." United States v. IBT (Review Board Rules), 829 F.Supp. at 608. This circumstance is unique, in that the internal union proceeding is monitored by an external oversight entity with its own standard of review. As such, the lower standard of "some evidence" is inapplicable and the higher standard of "substantial evidence" applies.

Substantial evidence has been defined as "more than a mere scintilla [and] means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Chrysler Corporation v. U.S. Environmental Protection Agency, 631 F.2d 865, 890 (D.C. Cir., 1980);

See also United States v. IBT (Simpson), 120 F.3d at 346 (internal quotations and citations omitted).

Assuming that the reviewing court determines the finding is based upon substantial evidence, inferences based on those findings are discretionary and can only be disturbed if they are "arbitrary and capricious. When reviewing inferences, the courts are "oblige[d] . . . to guard against an agency [ ] drawing inferences that are 'arbitrary' in relation to the facts found, no matter how substantial may be the support for those facts." Midtec Paper Corp. v. United States, 857 F.2d 1487, 1498 (D.C. Cir., 1988).

However, as to each appeal that has come before it stemming from enforcement of the Consent Decree, the Court of Appeals has found it unnecessary to define the precise standard of review to be applied on appeal because in each case the Court concluded "that the district court's order should be affirmed under any arguable applicable standard of review." United States v. IBT (Simpson), 120 F.3d 341, 346 (2d Cir., 1997)(internal quotation marks omitted)(citing cases); *See also e.g.,* United States v. IBT (Sansone), 981 F.2d 1362, 1368 (2d Cir., 1992)(citing cases).

In summarily affirming the Review Board decision in a one (1) sentence finding without articulating a standard of review (App., p. 1), the district court abrogated its responsibility and thus turned the court below into the initial reviewing court. Under those circumstances, the Court of Appeals should have treated the decision of the Review Board with great deference, United States v. IBT

(DiGirlamo), 19 F.3d at 820, and in accord with the Consent Decree and the Review Board Rules. United States v. IBT (Review Board Rules), 803 F. Supp. 761 (S.D.N.Y. 1992), *aff'd as modified*, 998 F.2d 1101 (2d Cir.), *on remand*, 829 F.Supp. 602 (S.D.N.Y. 1993). As a result, it was error for the Court of Appeals not to articulate a standard of review in deciding the matter of Petitioner's expulsion from the IBT.

ARGUMENT

A. THE COURTS ARE WITHOUT JURISDICTION TO REVIEW THIS MATTER

As discussed above, by letter dated August 6, 1996, the Review Board referred the instant matter to the Local 282 Trustee under powers granted it through the Consent Order.

Without authority of any kind, the Trustee elected to transfer the case to the International Union for hearing. Even if the instant matter were not referred by the Review Board, no authority exists for the International Union to appoint a disciplinary panel requested by the local union Trustee who, in this case, is a member of the local union. As a result, the panel convened by IBT General President Carey to hear the matter below was illegally constituted and any decision or recommendation therefrom is of no effect. Petitioner contends that the Court below erred in not recognizing same.

Even assuming, arguendo, that the hearing panel was legally constituted, the Trustee failed to comply with the procedural mandates dictated by the Review Board Rules and the IBT Constitution. *See* The procedural clock commenced on August 6, 1996, the day the Investigative Report was transmitted to the Trustee. The sixty (60) day period mandated by the Review Board would have run on October 6, 1996. Assuming arguendo that the ninety (90) day Constitutional period would have applied, such period would have run on November 6, 1996. The panel did not conduct its hearing until November 20, 1996, almost two (2) weeks past the last conceivable date a written report was due. As a result of this procedural error, Petitioner contends that the courts below did not have subject matter jurisdiction over this issue and erred in not dismissing the matter before them.

B. THIS MATTER WAS NOT DECIDED ON SUBSTANTIAL EVIDENCE

Petitioner contends that the Court below erred in not finding that the decision to expel Petitioner from his twenty-four (24) year membership in the IBT was based upon insubstantial evidence.

There is no requirement that a disciplinary matter brought pursuant to a Review Board proceeding need be proven by direct rather than circumstantial evidence. Reliable hearsay is admissible in IBT disciplinary hearings, *See* United States v. IBT (Senese & Talerico), 941 F.2d 1292, 1297-98 (2d Cir.) *cert. denied* 502 U.S. 819, 112 S.Ct. 76 (1991), and may constitute substantial evidence to

support an administrative decision. *See* Richardson v. Perales, 402 U.S. 389, 402-06, 91 S.Ct. 1420 (1971).

The issue in the instant matter is the reliability of the evidence presented in support of the charges against Petitioner. For the reasons that follow, Petitioner contends that the decision of the Court below should be overturned as the evidence did not meet the minimal standards required in administrative proceedings.

1. No Independent Investigation By Any Of The Charging Parties

As described above, the Local 282 Corruption Officers did not conduct an independent investigation with respect to the allegations against Petitioner as they were required to do. It appears that the Review Board also did not investigate the matter before referring it to the local union.

2. The Charging Parties' Exclusive Reliance on the FBI Reports

The Review Board report relies exclusively on reports purportedly obtained from the Federal Bureau of Investigation. While this Petition does not address the question of how confidential FBI reports came into possession of the Local 282 Corruption Officer or the Review Board, there is no indication that that there was ever an attempt to corroborate any of the information contained in the reports that were the basis of the charges against Petitioner. Moreover, since the information was

produced by the same source, and the individuals involved in the production of the FBI material were all engaged in the same enterprise of attempting to prove Petitioner accepted a bribe, the reliability of the information contained in the reports is suspect abinitio without some independent corroboration.

Petitioner alleges he never accepted a bribe. However, assuming, arguendo, that the FBI reports and the tape recording of the purported bribe taking are somehow found to corroborate each other to prove that a bribe was accepted, there was no report that the confidential informant was ever searched after his meeting with Petitioner to ascertain whether the informant had sequestered the money. More importantly, the confidential informant was out of surveillance range for fifteen (15) minutes. In the interim, the confidential informant claimed that he drove "down Union Turnpike." This time period would have permitted the confidential informant to sequester the money allegedly given to Petitioner, or even give it to a confederate, before returning to the surveillance scene. Petitioner raised such objections below; however, the Court below ignored them.

Moreover, the only purported evidence in the FBI reports that Petitioner accepted payment of a bribe is in a report describing the confidential informant's debriefing. In this report, an FBI agent, who was not called as a witness by the charging parties, writes that the confidential informant "says" that Petitioner took the envelope. In view of the foregoing, it is self-evident that such statements do not meet the level of substantial evidence.

Furthermore, the FBI tape and transcript purporting to reproduce the conversation between Petitioner and the confidential informant is also suspect. During the hearing, Petitioner attempted to present expert reports concerning certain material discrepancies between the tape, the FBI transcript, and what the experts had heard on the tape. Inter alia, one of the experts opined that (a) there appeared to be a hum simultaneously under the confidential informant's speech which would indicate some sort of re-recording, (b) there appeared to be a splice or edited section within the confidential informant's speech, (c) speech attributed to Petitioner seems to have been overdubbed, (d) the voice of an unidentified party appears on the tape. Such additions and changes make a material difference in the substance of the conversation between the two individuals.

However, the hearing panel accepted the experts' reports concerning the tape only "for what it is worth," evidence that they were not accorded much weight in the panel's deliberation. The receipt of evidence in such a manner, along with the Chairperson's statement that the experts' reports could not be cross examined, establish that Petitioner's objections to the authenticity of the tape were disregarded. While testimonial evidence was required of Petitioner with regard to the tape recording, the charging party was not required to present any testimonial evidence or even authenticate the tape presented as the chief evidence against Petitioner, nor was the charging party required to present testimonial evidence to corroborate the documents which were the basis of the charges against Petitioner. This was error on the part of the reviewing court in overlooking these points.

3. The Reviewing Court Also Erred in Regard to the Hearsay Evidence Presented

Petitioner also contends that the court below erred in regard to the hearsay evidence presented in support of the charges against Petitioner.

Hearsay statements, so long as they are accompanied by a sufficient indicia of reliability are admissible in IBT proceedings. United States v. IBT, 941 F.2d at 1297-98. Hearsay statements gain reliability when corroborated by non-hearsay statements or by reliable independent sources. As described above, the charging party presented five (5) principal pieces of evidence against Petitioner. For the reasons that follow, the following hearsay documents lack reliability sufficient enough to be considered substantial evidence:

1) The events described in the FBI memo dated April 8, 1992 stating that the informant was supplied with money for a bride are uncorroborated. Petitioner stated that he never saw an envelope or any money.

2) The surveillance log maintained by the FBI dated April 7, 1992 only reports the information on the tape recording and does not independently corroborate same.

3) The informant's statements contained on the FBI memo of the interview conducted with the informant are not independently corroborated.

4) The purported transcript of the informant's meeting with Petitioner is based upon a flawed tape recording which has not been authenticated, nor has the tape's chain of custody been assured.

Petitioner will show this Court that the court below erred in finding that the statements of the informant made to the FBI agent subsequent to the surveillance, and the FBI agent's observation of the meeting between Petitioner and the informant, provide sufficient reliability upon which to ground the Review Board decision.

Although hearsay statements may corroborate each other, the court below erred in not determining that, as a result of the FBI agent and the informant being engaged in the same enterprise of proving Petitioner accepted a bribe, the corroboration was not sufficiently independent to make the hearsay evidence presented against Petitioner reliable. United States v. Prescott, 920 F.2d 139, 145 (2d Cir., 1990)(accounts relied upon were numerous and independent); United States v. Carmona, 873 F.2d 569, 575 (2d Cir., 1989)(sources sufficiently independent and similar to corroborate hearsay evidence).

Independent corroboration of hearsay evidence is especially important in this matter because of the glaring inadequacies in conducting the surveillance, the fifteen (15) minute interval following the informant's meeting with Petitioner where the informant was unobserved, the failure of the FBI agent to search the informant, and the failure to

ascertain whether Petitioner ever negotiated the allegedly marked money.

Furthermore, Petitioner will show that the court below erred in determining the taped statements of the informant to be reliable because they appeared to be corroborated by Petitioner's taped statements. First, the gravaman of the charges against Petitioner were based upon the informant's reports to the FBI. These reports were uncorroborated by any other independent source. The court below did not address these reports, discussing only the informant's recorded statements

Secondly, Petitioner contends that the presentation of Petitioner's own statements on the tape recording, while admittedly not hearsay, were unreliable because the unauthenticated tape was flawed as described by the expert reports Petitioner attempted to enter into evidence. In view of those obvious difficulties, the court below erred in not addressing them. United States v. Long, 917 F.2d 691, 700 (2d Cir., 1990)(No evidence that the reliability of the tapes had been assured.).

Moreover, even if the tape is reliable, the evidence presented to support the charges is not. Petitioner never took the bribe; the FBI did not search the informant to ascertain whether the informant had sequestered the money, there were fifteen (15) minutes unaccounted for from the termination of the conversation between Petitioner and the informant and the time the informant reported back to the FBI, and the FBI's "marked" bills, supposedly paid over to Petitioner, were never found. No proof was offered that

showed Petitioner ever possessed the money or negotiated the bills and Petitioner denied taking the bribe.

The informant was not called as a witness in the disciplinary proceeding. The court below determined that Petitioner was not denied his right to cross examine the informant. However, in so finding, the court overlooked Petitioner's right to test the credibility of the informant. *See* United States v. Sorrentino, 72 F.3d 294, 298 (2d Cir., 1995)(Informant called as a witness; statements on tape recording admitted to render intelligible what Defendant said in conversation.)

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant the instant Petition.

C. IN THE ALTERNATIVE, THE DECISION IN UNITED STATES V. IBT (GIACUMBO), 170 F.3D 136 (2D. CIR., 1999), SHOULD BE GIVEN RETROACTIVE EFFECT

Oral argument before the Court of Appeals in the instant matter was held on December 10, 1998 and a decision was rendered on February 4, 1999. On or about April 20, 1998, the Court of Appeals held oral argument in the matter of United States v. IBT (Giacumbo), 170 F.3d 136 (2d. Cir., 1999), rendering a decision on March 2, 1999. (App., pp.21-44). Therein, the Court held that despite that court's prior holdings wherein the Court affirmatively declined to apply a standard of review, the Court's standard of review would henceforth be that of

substantial evidence. Giacumbo 170 F.3d at 142. Should this Court grant the instant Petition, Petitioner will request that this Court give retrospective effect to the decision of the lower court.

Generally, retrospective effect will be given to a decision if the decision to be applied nonretroactively establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Chevron Oil Company v. Huson, 404 U.S. 97, 106, 92 S.Ct. 349 (1971) (internal citations omitted). In deciding whether to provide retrospective application, the Court "must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Chevron Oil Company v. Huson at 404 U.S. at 106-107 *quoting* Linkletter v. Walker, 381 U.S. 618, 629, 85 S.Ct. 1731, 1738, (1965). Finally, the Court must weigh the inequity imposed by retroactive application where a decision could produce substantial inequitable results if applied retroactively within the standard of avoiding the injustice or hardship by a holding of nonretroactivity. Chevron v. Huson, 404 U.S. at 107, *quoting* Cipriano v. City of Houma, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900 (1969).

In Giacumbo, the appellant, a former local president was expelled from the IBT for, inter alia, breaching his financial duties by embezzling and converting funds. In reversing the decision of the district court, the Court of

Appeals held that their review de novo of Review Board actions shall apply the same standard of review applicable to review of final federal agency action under the Administrative Procedure Act, to "review the record to determine whether the agency considered the relevant factors and acted within its discretion." United States v. IBT (Giacumbo), 170 F.3d at 142 *citing* Aquarius Marine Co. v. Pena, 64 F.3d 82, 87 (2d Cir., 1995).

Under the circumstances of the instant matter, where the district court summarily approved the Review Board's decision to expel Petitioner from the IBT, and the Court of Appeals as the initial reviewing court failed to apply the substantial evidence rule to the decision below, Petitioner contends that retrospective application of the decision in United States v. IBT (Giacumbo) is appropriate in this matter.

As a result of the foregoing, Petitioner respectfully requests that this Court grant the instant Petition.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Dated: June 14, 1999

Respectfully submitted,

JESSE S. DRUCKER
Counsel of Record
3380 Veterans Mem. Hwy.
Bohemia, New York 11716
(516) 737-3330

Attorney for Petitioner